

# Exhibit 6

1 IN THE UNITED STATES BANKRUPTCY COURT  
2 FOR THE DISTRICT OF DELAWARE  
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4 In re: ) Chapter 11  
5 Fleming Companies, Inc., et al., )  
6 Debtors, ) Case No.  
7 ) 03-10945 (MFW)  
8 -----  
9

10 DEPOSITION OF WAYNE BERRY  
11  
12

13 Taken on behalf of the Debtors at the offices of  
14 Kobayashi, Sugita & Goda, First Hawaiian Center,  
15 26th Floor, 999 Bishop Street, Honolulu, Hawaii,  
16 commencing at 9:11 a.m., Thursday, July 1, 2004.  
17  
18  
19  
20  
21  
22

23 BEFORE: CHARI L. POSSELL, CSR NO. 414  
24 Certified Shorthand Reporter  
25

1 APPEARANCES:

2 For Debtors:

3 ERIC C. LIEBELER, ESQ.

4 DAMIAN D. CAPOZZOLA, ESQ.

5 Kirkland & Ellis

6 777 South Figueroa Street

7 Los Angeles, California 90017

8  
9 For Official Committee of Unsecured Creditors:

10 JULIE M. SKIDMORE, ESQ.

11 Pepper Hamilton, LLP

12 36th Floor

13 100 Renaissance Center

14 Detroit, Michigan 48243-1157

15  
16 For Deponent:

17 TIMOTHY J. HOGAN, ESQ.

18 Lynch Ichida Thompson

19 Kim & Hirota

20 1132 Bishop Street

21 Suite 1405

22 Honolulu, Hawaii 96813

23  
24 Also Present: JUSTIN LANGLAIS, Videographer

25 -oOo-

1 Q. Have you written any specific software for  
2 Y. Hata?

3 A. What do you mean by specific software?

4 Q. You know what specific software is, don't  
5 you, sir?

6 A. I am looking for your definition so I can  
7 answer your question.

8 Q. Have you written any software at all for  
9 Y. Hata?

10 A. To give you the -- my strict take on it, I  
11 don't write software for anyone other than myself.

12 Q. Have you licensed any software that you own  
13 to Y. Hata?

14 A. Yes, I have.

15 Q. Does that license -- strike that.

16 Withdrawn.

17 Is that an oral or a written license?

18 A. It is a written license.

19 Q. How many written license agreements are  
20 there between you on the one hand and Y. Hata & Co.  
21 Ltd. on the other?

22 A. One.

23 Q. And what is the subject of that written  
24 license agreement and how would you describe the  
25 software that you have licensed to Y. Hata?

1 A. It is a freight control system.

2 Q. Is it the same or a different freight  
3 control system than the one at issue in your claim  
4 against the estate?

5 A. By same or different, are you talking  
6 functionality, code, design, structures? Help me a  
7 little bit.

8 Q. Sure. On any basis that you are  
9 comfortable asking the question, on the assumption  
10 that you are explaining it to a lawyer who's not a  
11 software expert.

12 MR. HOGAN: I would object on the  
13 grounds of vagueness. Answer if you can.

14 THE WITNESS: Some of the -- some of  
15 the elements are similar. Some expressions are  
16 similar. But it's radically different in many ways  
17 and much improved than the one that was left with  
18 Fleming in October of 1999.

19 BY MR. LIEBELER:

20 Q. Does Y. Hata pay you a license fee for the  
21 use of the freight control system?

22 A. Yes.

23 Q. And how much is that license fee?

24 A. I think I would consider that confidential  
25 information at this point. I would like to -- I

1 think I would like to get their permission to -- for  
2 me to repeat that.

3 Q. I don't believe that's the basis for not  
4 answering in this deposition, sir. And it is -- it  
5 will be my contention that that will be relevant  
6 testimony for purposes of what we are doing here now.  
7 So I would ask you to answer that question, sir.

8 A. You may be correct in that, but I don't  
9 want to violate a nondisclosure.

10 Q. Are you refusing to answer my question,  
11 sir?

12 A. At this point.

13 Q. For your information -- and I can pull the  
14 document and we may do it a little bit later -- your  
15 counsel has indicated to either me or my compatriot,  
16 Mr. Capozzola, that you currently receive \$115 per  
17 container for something. I don't want to  
18 characterize what it is because I don't have the  
19 exact detail in front of me. Are you familiar with  
20 that?

21 A. Yes. There's a formula for a calculation  
22 like that, yes.

23 Q. Is that with respect to your relationship  
24 with Y. Hata?

25 A. Yes.

1 beginning of the second full paragraph that you,  
2 Mr. Berry, had some desire to market your software  
3 commercially, correct?

4 A. Yes.

5 Q. And the software that this addendum refers  
6 to is the three separate pieces that you articulated  
7 in the complaint you filed before the petition,  
8 right?

9 A. It includes those three, but the software  
10 we are discussing here is thousands of program files.

11 Q. That's why I said "includes."

12 A. Yes.

13 Q. For nomenclature purposes, what should I  
14 call that group of software, that group of programs  
15 and that software that you are referring to in the --  
16 strike that -- that the second addendum refers to,  
17 your Freight Control System? I don't want to use  
18 that as a term of art, because that's a separate term  
19 of art in the complaint. What nomenclature should I  
20 use to describe the software that you intended to  
21 market?

22 A. The entire collection, I have referred to  
23 it as FCS 1993.

24 Q. Back to the nomenclature we talked about  
25 earlier?

1 A. Right.

2 Q. At least according to the second addendum,  
3 you intended to market the FCS 1993 commercially; is  
4 that right?

5 A. Yes.

6 Q. Did you ever succeed in licensing FCS 1993  
7 to anyone other than Fleming?

8 A. No.

9 Q. Did you ever enter into substantial  
10 negotiations with any other entity to license FCS  
11 1993 to them?

12 A. What do you mean by substantial  
13 negotiations?

14 Q. What I mean is negotiations that were sort  
15 of past the very initial steps of saying to someone,  
16 "Hey, do you want this stuff?" And they say yes, and  
17 you have to sit down and negotiate the terms.  
18 Substantial negotiation would be past just the  
19 initial expression of interest.

20 A. I am trying to remember. We had -- I  
21 should say I had -- during that period of time, I  
22 don't know if you characterize it as substantial  
23 negotiations, but in -- prior to 1999 and again in  
24 1999, it was sort of an ongoing thing, I did have  
25 lengthy discussions with K-Mart regarding it. And



1 that had been over a period of years stretching back  
2 to 1996.

3 And the last time I -- in this time frame  
4 you are referring to, in that -- up through like a  
5 year or two after these agreements, I had -- the last  
6 discussion I had with them was I think early 2000,  
7 late 1999 or early 2000. And that's -- I think that  
8 was the Foodland in 2000 -- 2001. I was working on  
9 FCS 2003. Of course, we hadn't even hit the date  
10 yet, so that software wasn't even born yet. But I  
11 was in detailed negotiations with Foodland, and my  
12 intention was to start with FCS 1993 and migrate to  
13 the 2003 version as I completed it. So that -- those  
14 are the only two I can recall at this point.

15 Q. All right. Just so the record is clear,  
16 then, you were engaged in some level of discussion  
17 with both K-Mart and Foodland with respect to a  
18 potential license agreement for FCS 1993; is that  
19 right?

20 A. Yes.

21 Q. And neither of those agreements ended up  
22 coming to fruition; is that true?

23 A. That's correct.

24 Q. And neither K-Mart nor Foodland ever paid  
25 you money in exchange for a license of FCS 1993; is

1 that right?

2 A. That's correct.

3 Q. And under the EULA and the first addendum  
4 and the second addendum, Fleming did not pay you any  
5 money to license FCS 1993 either, did it?

6 A. No, they did not.

7 Q. That's because under the terms of the  
8 agreement, it was a free license, right?

9 A. It was a temporary fix for them because  
10 they were going to get software from the Mainland,  
11 most likely from Manugistics, and I was trying  
12 accommodate them.

13 Q. I understand they might have been getting  
14 software elsewhere, but this was a free license, was  
15 it not?

16 A. A limited free license. There was no  
17 intent for this -- you can even read what Mr. Stussi  
18 wrote here about how it was going to be used for a  
19 while and they were going to destroy the copies.

20 Q. I understand there are limitations on the  
21 license, but that's another question.

22 Regardless of how limited it is and how  
23 broad it is -- and I understand your contention it is  
24 limited --

25 A. Yes.

1 Q. -- it was a free license; is that right?

2 A. For its stated purpose, yes.

3 Q. So Fleming did not even pay you so much as  
4 a dime for this license, whatever its terms; isn't  
5 that right?

6 A. Not that I am aware of, no.

7 Q. It is correct, sir, is it not, that Fleming  
8 did not even pay you so much as a dime?

9 A. I don't remember receiving any money from  
10 this. I believe you are correct.

11 Q. Very good.

12 Now, in your view, do you have any current  
13 obligations under either the EULA or the first  
14 addendum or second addendum?

15 MR. HOGAN: Objection. Calls for a  
16 legal conclusion.

17 You can answer if you can.

18 THE WITNESS: First, I would have to  
19 ask you your position. Is this something that you  
20 lost at the end of the trial when your client was  
21 found to be a willful infringer? Do you consider  
22 these collection of documents to be the license? Are  
23 you going to pick one of them as a license or are  
24 they -- I don't know how to answer your question. I  
25 would love to know your position.

1 I have seen it in your time records all  
2 these rejections and you keep staring at this thing,  
3 but where are you going with it?

4 BY MR. LIEBELER:

5 Q. You know what, Mr. Berry, it is a  
6 deposition, and I get to ask you questions. That's  
7 the way the process works.

8 A. But you have to give me the foundation.

9 Q. And I have. You signed this agreement of  
10 your own free will, and in fact, you drafted 5/7 of  
11 it.

12 A. Right.

13 Q. In your businessman's understanding, as you  
14 sit here today, do you have any current obligations  
15 under this set of documents?

16 MR. HOGAN: Objection. Calls for a  
17 legal conclusion.

18 You can answer.

19 THE WITNESS: Until I know your  
20 position, I have no idea.

21 BY MR. LIEBELER:

22 Q. You can't answer that one way or the other;  
23 is that fair?

24 A. I don't know.

25 Q. I understand the testimony. I just want to

C E R T I F I C A T E

STATE OF HAWAII )  
CITY AND COUNTY OF HONOLULU ) SS:


I, CHARI L. POSSELL, Notary Public, State  
of Hawaii, do hereby certify:

That on Thursday, July 1, 2004, at  
9:11 a.m., appeared before me WAYNE BERRY, the  
witness whose deposition is contained herein; that  
prior to being examined he/she was by me duly sworn;

That the deposition was taken down by me in  
machine shorthand and was thereafter reduced to  
typewriting under my supervision; that the foregoing  
represents, to the best of my ability, a true and  
correct transcript of the proceedings had in the  
foregoing matter.

I further certify that I am not attorney  
for any of the parties hereto, nor in any way  
concerned with the cause.

DATED this 1st day of July, 2004, in  
Honolulu, Hawaii.

  
CHARI L. POSSELL, CSR NO. 414  
Notary Public, State of Hawaii  
My Commission Exp: 7-25-2007